

**STATE OF MICHIGAN
IN THE SUPREME COURT**

COMPLAINT AGAINST:

**Hon. Beverley Nettles-Nickerson
30th Circuit Court
Veterans Memorial Courthouse
313 W. Kalamazoo St.
PO Box 40771
Lansing, MI 48901**

**Supreme Court No. 133929
JTC Formal Complaint No. 81**

AMICI CURIAE BRIEF OF THE ASSOCIATION OF BLACK JUDGES OF MICHIGAN

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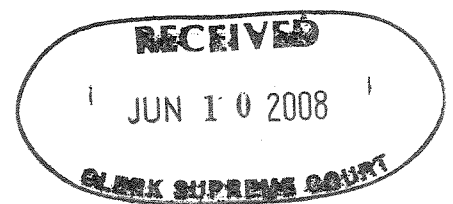


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STANDARD OF REVIEW

This Court reviews the record de novo. *In re Noecker*, 472 Mich 1; 691 NW2d 440 (2005). Both the factual findings and disciplinary recommendations of the Commission are reviewed de novo. *In re Haley*, 476 Mich. 180; 720 NW2d 246 (2006). In reviewing the record de novo, this Court considers whether the conduct charged and found by the Commission is established by the record, whether the conduct is of a nature warranting discipline, and whether the discipline recommended by the commission or some other form of discipline should be imposed. *In re Moore*, 464 Mich. 98, 626 NW2d 374 (2001).

AMICI CURIAE'S INTERESTS IN THIS MATTER

Amici Curiae Association of Black Judges of Michigan (ABJM) is a group of judges from across the State of Michigan who serve at various levels in state and federal courts. ABJM was created to provide assistance, guidance, mentorship, networking opportunities and training to members. ABJM has filed a motion seeking authority to file an amicus brief in this matter based upon the following concerns.

First, there have been recent concerns that the Judicial Tenure Commission (Commission) overwhelmingly and disproportionately targets judges who are members of racial minorities. Second, the unprecedented nature of the Commission's decision and recommendation for discipline including exorbitant costs in this case seems to give credence to the perception of selective and overzealous enforcement of disciplinary proceedings against minority judges. Third, the unified procedures that permit the Commission to investigate, prosecute and adjudicate allegations are unconstitutional.

STATEMENT OF FACTS

ABJM adopts by reference the Statement of Facts set forth in the Brief in Support of Petition on Behalf of Hon. Beverley Nettles-Nickerson Opposing the Judicial Tenure Commission's Decision and Recommendation for Order of Discipline submitted to this Court.

LEGAL ARGUMENT

I. THE COMMISSION'S UNITARY STRUCTURE OF INVESTIGATION, PROSECUTION, AND ADJUDICATION VIOLATES DUE PROCESS.

The Commission's procedures permit it to investigate, prosecute, and adjudicate allegations of judicial misconduct. This unitary structure has previously been the subject of inquiry among the judiciary and the State Bar of Michigan. Those challenges have been based upon the fact that the system is inherently unfair. In the past, the State Bar of Michigan Judicial Conference and the State Bar of Michigan Board of Commissioners and other groups have recommended that this Court consider bifurcating the investigative and adjudicative functions of the Commission. ABJM has also been vocal in urging reform to this antiquated system. This Court declined to adopt those suggested changes.

While it has been recognized by this Court that combining the investigative and adjudicative roles in a single governmental agency does not necessarily violate due process, under certain circumstances, combining the functions into one agency can result in a procedural due process violation. See *In re Del Rio*, 400 Mich 665, 690; 256 NW2d 727 (1977), App dismissed 434 US 1029; 98 S Ct 759; 54 LEd 777 (1978).

In sustaining the constitutionality of the unitary process of investigation and adjudication employed by the Commission, thereby declining to find the system lacking in due process, the *Del Rio* Court relied on the United States Supreme Court's decision in *Withrow v Larkin*, 421 US 35, 47; 95 S Ct 1456; 43 LEd2d 712 (1975). While the United States Supreme Court did not find a procedural due process violation present in *Withrow*, it did state the following regarding circumstances in which the same agency determines probable cause and the ultimate adjudication:

Clearly, if the initial view of the facts based on the evidence derived from non-adversarial processes as a practical or legal matter foreclosed fair and effective consideration at a subsequent adversary hearing leading to ultimate decision, a substantial due process question would be raised....

That the combination of investigative and adjudicative functions does not, without more, constitute a due process violation, does not, of course, preclude a court from determining from the special facts and circumstances present in the case before it that the risk of unfairness is intolerably high.

Withrow, 421 US at 58.

In regard to whether a procedural due process violation had occurred in *Del Rio*, this Court concluded:

In the case at bar the respondent fails to document the charge that the combination of the investigative and adjudicative roles in the Commission creates any risks of actual bias or prejudgment. Respondent simply asserts that the bias is “inherent” in the process. This Court has made a conscious effort to segregate within the commission the investigative and adjudicative functions.

Del Rio, 400 Mich at 691.

In relying on *Withrow* to sustain the constitutionality of the unitary system of investigation and adjudication, the Court in *Del Rio* left open the possibility that in certain circumstances combining the investigative and adjudicative functions will violate one's procedural due process rights. Clearly, *Withrow* did not create a blanket rule whereby all unitary systems were declared fit to protect the procedural due process rights of the person being investigated and adjudicated.

In reaching its decision upholding the physician discipline system in *Withrow*, the United States Supreme Court relied on its earlier decision in *In re Murchison*, 349 US 133, 75 S Ct 623 (1955). In *Murchison*, a Detroit Records Court judge, acting as a one-man grand jury with the authority to compel witnesses to testify before him in

secret, charged two witnesses with criminal contempt and then himself tried and convicted them. As summarized by the Court in *Withrow*:

This court found the procedure to be a denial of due process of law not only because the judge in effect became part of the prosecution and assumed an adversary position, but also because as a judge passing on guilt or innocence, he very likely relied on "his own personal knowledge and impression of what had occurred in the grand jury room," an impression that "could not be tested by adequate cross-examination." 349 US, at 138, 75 S Ct, at 626.

Withrow, 421 US at 53.

The similarities between the facts of *Murchison* and the process employed by the Commission are very troublesome. The Commission conducts the investigation and then decides whether to charge based upon information gleaned from that investigation. The Commission has the power to adjudicate the matter and thereby shape the record that will ultimately be reviewed by this Court. The Commission performs these important adjudicative functions while tainted by all of the knowledge gained from its *ex parte* investigation.

The need to place safeguards between the investigative functions and the adjudicative functions an agency performs was succinctly explained in the case of *Vander Toorn v City of Grand Rapids*, 132 Mich App 590; 348 NW2d 697 (1984):

In the instant case, as reflected by the above-quoted excerpts from the Commission's minutes and Frankforter's testimony, the Commission was not merely familiar with the facts and did not merely make an investigation and some preliminary determination, but rather actually participated in the decision to terminate plaintiff's employment, the same decision the propriety of which it later reviewed. Hence, we conclude that the Commission's final decision upholding plaintiff's discharge based on just cause was not that of an impartial arbiter so as to preclude a jury's assessment of whether just caused existed....

Vander Toorn, 132 Mich App at 592.

In Judge Nettles-Nickerson's case, the Commission is the entity that made a determination to file a petition for interim suspension alleging that she was unfit to continue on the bench pending the outcome of proceedings on the Complaint. That determination was made prior to the time the Complaint was even filed or served upon Judge Nettles-Nickerson. The prejudice exhibited by the Commission in this proceeding can only be explained by its inability to separate its investigative, prosecutorial, and adjudicative duties, and the attendant problems that occur when such duties cannot be separated. The old attorney disciplinary system in Michigan also carried out investigatory, prosecutorial, and adjudicative functions. A quarter of a century ago, this Court struck that system down as being inherently unfair and created a bifurcated system for Michigan's attorney disciplinary system.

More recently, with regard to the bifurcated system employed in the Attorney Disciplinary system, this Court stated:

To ensure fairness and effectiveness in the disciplinary process, this Court deliberately created a bifurcated disciplinary agency in which the prosecutorial and quasi-judicial branches are separate and distinct. According to MCR 9.108(A), the Attorney Grievance Commission serves as the "prosecution arm of the Supreme Court for discharge of its constitutional responsibility to supervise and discipline Michigan attorneys." The Attorney Grievance Commission has the power to "supervise the investigation of attorney misconduct, including requests for investigation of and complaints against attorneys...." MCR 9.108(E)(2). ...

The institutional "check" on the prosecutorial branch is the quasi-judicial branch, the board, which acts as the "adjudicative arm of the Supreme Court" in discharging this Court's duty to supervise Michigan attorneys. MCR 9.110(A). The board appoints hearing panels under MCR 9.110(E)(2) and, further, reviews a final order of discipline or dismissal issued by hearing panels, MCR 9.110(E)(4)....

Grievance Administrator v Duetch, 455 Mich 149, 158; 565 NW2d 369 (1997).

The United States Supreme Court has precisely identified the problems attendant in non-bifurcated proceedings, and has described the difficulties associated with such a system:

As a practical matter, it is difficult if not impossible for a judge to free himself from the influence of what took place in his "grand jury" secret session. His recollection of that is likely to weigh far more heavily with him than any testimony given in open hearings.

Murchison, 349 US at 138.

ABJM believes that the unitary system as applied to Judge Nettles-Nickerson's case, denied her the right to procedural due process.

II. THE JUDICIAL TENURE COMMISSION'S UNPRECEDENTED RECOMMENDATION TO BOTH REMOVE AND CONDITIONALLY SUSPEND JUDGE NETTLES-NICKERSON IS VIOLATIVE OF CONST. 1963, ART. 6, § 30 AND CONST. 1963, ART. 6, § 4.

This Court's authority to discipline members of the state judiciary flows from two sources, §§ 30 and 4 of Article 6 of the Michigan Constitution. *Matter of Probert*, 411 Mich 210, 229; 308 NW2d 773 (1981). Const. 1963, art. 6, § 30 provides:

(2) On recommendation of the judicial tenure commission, the supreme court may censure, suspend with or without salary, retire or remove a judge for conviction of a felony, physical or mental disability which prevents the performance of judicial duties, misconduct in office, persistent failure to perform his duties, habitual intemperance or conduct that is clearly prejudicial to the administration of justice. The supreme court shall make rules implementing this section and providing for confidentiality and privilege of proceedings.

Const. 1963, art. 6, § 4 provides:

The supreme court shall have general superintending control over all courts; power to issue, hear and determine prerogative and remedial writs; and appellate jurisdiction as provided by rules of the supreme court. The supreme court shall not have the power to remove a judge.

When interpreting constitutional provisions, Michigan courts are guided by two fundamental precepts. First, under the rule of common understanding, this Court interprets constitution provisions to have the meaning most obvious to the reasonable person. See *Traverse City Sch Dist v Attorney General* 384 Mich 390, 405 185 N.W.2d 9 (1971). Second, “because fundamental constitutional principles are of equal dignity, none must be so construed as to nullify or substantially impair another.” *Probert, supra* citing *People v Blachura*, 390 Mich 326, 333; 212 NW2d 182 (1973).

This Court’s general superintending control of all Michigan courts is a broad grant of constitutional authority to take necessary action, short of the outright removal of a judge. At issue in this case is whether the Commission or this Court has jurisdictional authority to impose **conditional** sanctions **after** a judicial officer is removed from office. As recognized by this Court in *Probert*-- “[e]ven in the case of the most extreme civil sanction that can be inflicted upon a judge impeachment the penalty “**shall not extend further than removal from office**”. *Probert, supra* at 233 n 18, citing Const. 1963, art. 11, § 7 (emphasis added).

The issue of whether Const. 1963, art. 6, § 30 authorizes sanctions against non-judicial officers was raised in the dissenting opinion of Justice Levin:

[T]he power to recommend discipline and to enter a final order of discipline is defeated because s 30 authorizes the recommendation and imposition of discipline for **incumbent** judges only. Since the commission has no power to recommend discipline and the Court has no power to order discipline under s 30, neither the commission nor the Court has power to continue to address the merits of the disciplinary proceeding. It is the lack of power to recommend and to order discipline under s 30 which defeats jurisdiction under s 30.

Id. at 245 (emphasis added).

Here, should this Court remove Judge Nettles-Nickerson from office, she is

divested from office and is no longer a judicial officer. The Commission's authority to recommend and impose additional condition is prohibited under Const. 1963, art. 6, § 30.

III. THE PORTION OF THE \$128,861.26 IN COSTS THAT ARE ASSOCIATED WITH THE PAYMENT OF PRIVATE COUNSEL SHOULD BE REJECTED BY THIS COURT.

Under Const. 1963, art. 6, § 30, "[t]he supreme court shall make rules implementing this section and providing for confidentiality and privilege of proceedings." The confidentiality of proceedings has traditionally been respected by the Commission as it has a full-time staff of attorneys who have historically prosecuted formal complaints filed by the Commission. Yet, the confidentiality of the instant proceedings has been threatened with the retention of private and non-State attorneys.

Commission post-complaint confidentiality restrictions are governed by MCR 9.216(D), which provides in relevant part:

- (1) When the commission issues a complaint, the following shall not be confidential or privileged:
 - (a) the complaint and all subsequent pleadings filed with the commission or master, all stipulations entered, all findings of fact made by the master or commission, and all reports of the master or commission; however, all papers filed with and proceedings before the commission during the period preceding the issuance of a complaint remain confidential and privileged except where offered into evidence in a formal hearing; and
 - (b) the formal hearing before the master or commission, and the public hearing provided for in MCR 9.216.

Whom the Commission may employ is governed by MCR 9.202(G) and provides in relevant part:

- (1) The commission shall employ an executive director or equivalent person or persons, and such other staff members as the commission

concludes are warranted, to perform the duties that the commission directs, subject to the availability of funds under its budget.

The Commission's retention of outside counsel is violative of MCR 9.202(G) and akin to the hiring of a "special prosecutor" an act, heretofore, unprecedented in this State. MCR 9.202 contemplates that staff members shall conduct the affairs of the Commission—as has always been the case in Michigan judicial disciplinary proceedings. The potentially chilling effect of Commission's unilateral decision to hire outside counsel would force judicial officers to abandon any potential defense if faced with the paying the costs of the Commission's counsel in addition to their own defense costs. For all of these reasons, the costs recommended by the Commission must be rejected.

RELIEF SOUGHT

ABJM requests that this court reject the findings of the Commission as they are incurable by prejudice resulting from the unified system employed by the Commission. If the Court is inclined to accept any of the Commission's recommendations, ABJM requests that the additional suspension (beyond removal) as recommended by the Commission, be rejected. Lastly, if any costs are going to be awarded to the Commission, such costs should not include private attorney fees.

Respectfully submitted by:

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Dated: June 10, 2008